

Emerging Approaches to Asserting and Protecting Tribal Water Rights

Heather Whiteman Runs Him
Staff Attorney, Native American Rights Fund
California Tribal Water Summit
April 24, 2013

Roadmap

- * Current State of California Water
- * Established Methods for Assertion of Right to Water
 - * Quantifying Reserved Rights (Adjudication)
 - * Water Settlements
- * New Approaches and Tools for Asserting and Protecting Rights
 - * Human Right to Water
 - * Domestic and International Law Provisions
- * Question and Answer

Current State of Water in California

- * California's capacity for storing and delivering water supplies is falling far behind the needs of a growing population.
- * Climate change resulting in a longer warm dry season, creating a challenge for water resources for municipal, industrial, and agricultural uses. Also an added factor of uncertainty in water planning.
- * Groundwater pollution: in 2007, water that fell below drinking water standards may have affected 1.2 million Californians and California has the highest number of schools with unsafe drinking water.

Tribal Water Rights

- * Despite the difficulties facing California's water system, tribes need to protect their water interests in the state.
- * One of many competing interests: municipal, industrial, conservation, recreation, agriculture.
- * Pressure on scarce resource, current proposals to expand infrastructure for storage and transport of water throughout state demonstrate the need for tribes to assert their rights and have a voice in this process.

Tribal Water Rights

- * The creation of an Indian reservation impliedly reserved water rights to the tribe(s) occupying the territory. Those water rights are reserved in order to carry out the purposes for which the lands were set aside, and the rights are paramount to later-asserted water rights perfected under state law. Three types:
 - * Riparian, overlying, and appropriative rights.
- * Reserved rights apply in California, which is a dual-system water state. Water systems:
 - * Riparian vs. Prior Appropriation vs. Dual-System

Judicial Forum to Quantify Water Rights

- * Adjudication to quantify water rights generally takes place in state court due to the McCarran Amendment
- * California State Court will likely refer to California State Water Resources Control Board, an administrative agency.
- * CSWRCB will quantify rights depending upon which right the tribe asserts, and to which water the tribe is seeking a quantified right.

Tribal Water Settlements

Benefits:

- * Water settlements improve water management by providing certainty not just as to the quantification of a tribe's water rights but also as to the rights of all other water users.
- * Settlements also give tribes an opportunity to establish water development and water management projects and may be an important source of employment for tribal members.
Opportunities for marketing water off-reservation, facilitating agreements with private parties, protecting tribal fisheries and wetlands, delivering cash for tribal and other local infrastructure development, and establishing water banking provisions.

Tribal Water Settlements

Some drawbacks:

- * Settlement negotiations can sometimes take as long as litigation, are expensive, and dependent on federal political climate.
- * Can be years before the benefits of the agreement reach the involved parties.
- * While settlements can provide tribes with more creative resolutions than those available to them in court, many tribes agree to receive a lesser amount of water than they would be able to get through litigation or compromise seniority in prior appropriation states.
- * Settlement negotiations for tribal water rights are also subject to the vulnerabilities of federal funding.

Human Rights to Water Internationally

- * U.N. General Assembly Resolution 64/292 recognizes “the right to safe and clean drinking water and sanitation as a human right that is essential for the full enjoyment of life and all human rights” as part of International Covenant on Economic, Social and Cultural Rights
- * While some countries work toward a national legal framework for the human right to water consistent with the United Nations, the United States has been more hesitant to do so.

United Nations Declaration on the Rights of Indigenous Peoples (UNDRIP)

- * UN adopted in 2007
- * Initial holdouts: USA, Canada, Australia, NZ
- * US Support pledged in 2010
- * Implementation of Declaration remains a work in progress
- * Specific processes for implementation and monitoring compliance needed
- * OAS DRIP yet to be finished.

UNDRIP

Preamble provision “[r]ecognizing that respect for indigenous knowledge, cultures and traditional practices contributes to sustainable and equitable development and proper management of the environment”

Article 1 provides that indigenous peoples, as collective or as individuals, have rights recognized by UN Charter, UDHR and international human rights law.

UNDRIP and Water Rights

- * Article 26.1 "Indigenous peoples have the right to the lands, territories and resources which they have traditionally owned, occupied or otherwise used or acquired."
- * Article 26.2 "Indigenous peoples have the right to own, use, develop and control the lands, territories and resources that they possess by reason of traditional ownership or other traditional occupation or use, as well as those which they have otherwise acquired."
- * Article 26.3: "States shall give legal recognition and protection to these lands, territories and resources. Such recognition shall be conducted with due respect to the customs, traditions, and land tenure systems of the indigenous peoples concerned."

UNDRIP and Water Rights


- * Article 25 recognizes the right of indigenous peoples to "maintain and strengthen their distinctive spiritual relationship with their traditionally owned or otherwise occupied and used lands, territories, waters and coastal seas and other resources."
- * Article 27 requires the establishment of a system to "recognize and adjudicate the rights of indigenous peoples pertaining to their lands, territories and resources..."

UNDRIP and Water Rights

- * Article 28 provisions on redress for lands and resources confiscated, taken, occupied, used, or damaged without FPIC.
- * Article 29 provisions on conservation and protection of resources, environmental health.
- * Article 32: Resource development and FPIC, and redress and mitigation.

UNDRIP and Water Rights

Article 12.1: Indigenous peoples have the right to manifest, practice, develop and teach their spiritual and religious traditions, customs and ceremonies; the right to maintain, protect, and have access in privacy to their religious and cultural sites; the right to the use and control of their ceremonial objects; and the right to the repatriation of their human remains.



The United States' explanation of its decision to endorse the Declaration states that, "... the United States intends to continue to work so that *the laws and mechanisms it has put in place* to recognize existing, and accommodate the acquisition of additional land, territory, and natural resource rights under U.S. law function properly and to facilitate, as appropriate, access by indigenous peoples to the traditional lands, territories and natural resources in which they have an interest... The United States will interpret the redress provisions of the Declaration to be *consistent with the existing system* for legal redress in the United States, while working to ensure that appropriate redress is in fact provided under U.S. law." Statement on the Announcement of U.S. Support for the United Nations Declaration on the Rights of Indigenous Peoples (U.S. Mission to the United Nations, December 16, 2010.) <http://usun.state.gov/documents/organization/153239.pdf>. Pp. 6-8 (emphasis added).

US Position on UNDRIP

- * Article 19 provision on Free Prior and Informed Consent (FPIC) not adequately enacted by Executive Order 13175 on Consultation with Tribal Governments.
- * US Statement says “meaningful consultation” but does not require consent; requires that topic of consultation “directly and substantially affect” tribe.
- * All couched with term “in accordance with federal law” and current consultation policy.
- * “meaningful consultation” does not equal “States shall consult and cooperate in good faith with the indigenous peoples concerned through their own indigenous institutions *in order to obtain their free, prior and informed consent...*”

Human Rights to Water Domestically

- * The United States is not a party to the International Covenant on Economic, Social and Cultural Rights, and a right to water is not protected by the U.S. Constitution.
- * Federal laws provide minimal protection, such as the Clean Water Act - which “establishes the basic structure for regulating discharges of pollutants into the waters of the United States and regulating quality standards for surface water, Safe Drinking Water Act, and others.
- * For federally recognized tribes with trust lands, US has affirmative obligation to protect water, which is a trust resource.
- * Ability of Tribes to expand regulatory powers through TAS.

UNDRIP in the US

United States court systems have failed to recognize protections for the rights of Native Americans, Alaskan Natives, and Native Hawaiians in their ability to utilize sacred sites for traditional religious practices.

Courts have repeatedly upheld governmental policies and decisions that have a detrimental impact on Native American, Alaska Native, and Native Hawaiian religious practices and that curtail access to sacred sites, and on the integrity of those sites and connected resources.

Human Right to Water in California

- * California Assembly Bill 685 added to the California Water Code, as section 106.3, "the established policy of the state that every human being has the right to safe, clean, affordable, and accessible water adequate for human consumption, cooking, and sanitary purposes."
- * Conceptualized as an individual, not a collective right.
- * However, it is unclear what impact this right would have socially and economically. Who is going to enforce this right? How are they going to enforce it? Against whom? What remedy should there be for a violation of the right?
- * Specific issues of unrecognized and newly recognized tribes need to be addressed.

Questions?